



that 1) the ALJ should not have ordered an IME in the absence of any evidence that claimant requires additional treatment and 2) that TTD should not have been ordered.<sup>3</sup>

Claimant argues that the Board should dismiss respondent's appeal for lack of jurisdiction and/or affirm the ALJ's Order in its entirety.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Although respondent asserts a jurisdictional basis for its appeal,<sup>4</sup> its complaint is wholly without merit given the uncontroverted fact that **respondent has admitted claimant suffered a compensable injury on January 26, 2010**. Failing that, respondent goes on to argue that the ALJ should not have awarded TTD benefits.

The Board's review of preliminary hearing orders is limited. Not every alleged error in law or fact is subject to review. The Board can review only allegations that an administrative law judge exceeded his or her jurisdiction.<sup>5</sup> This includes review of the preliminary hearing issues listed in K.S.A. 44-534a(a)(2) as jurisdictional issues, which are (1) whether the worker sustained an accidental injury, (2) whether the injury arose out of and in the course of employment, (3) whether the worker provided timely notice and timely written claim, and (4) whether certain other defenses apply. The term "certain defenses" refers to defenses which dispute the compensability of the injury under the Workers Compensation Act.<sup>6</sup>

The issue of whether a worker satisfies the definition of being temporarily and totally disabled is not a jurisdictional issue listed in K.S.A. 44-534a(a)(2). Additionally, the issue whether a worker meets the definition of being temporarily and totally disabled is a question of law and fact over which an ALJ has the jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a

---

<sup>3</sup> Respondent's Brief at 1 (filed Dec. 17, 2010)1.

<sup>4</sup> Appeal of Preliminary Hearing Order at 1 (filed Nov. 23, 2010).

<sup>5</sup> K.S.A. 2009 Supp. 44-551.

<sup>6</sup> *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.<sup>7</sup>

In sum, an ALJ has the jurisdiction and authority to grant temporary total disability benefits at a preliminary hearing. The Board has no jurisdiction to hear this dispute and therefore, respondent's appeal of that portion of the ALJ's decision is dismissed.

Similarly, the Board has no jurisdiction to hear respondent's complaint with respect to the ALJ's decision to appoint a physician to conduct an IME examination for purposes of determining whether claimant is in need of additional treatment. K.S.A. 44-534a grants authority to an ALJ to decide issues concerning the furnishing of medical treatment. And absent an allegation that the ALJ exceeded his jurisdiction, this Board is without the power to address appeals from such preliminary hearing matters.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.<sup>8</sup> Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

**WHEREFORE**, it is the finding, decision and order of the undersigned Board Member that the respondent's appeal of the Order of Administrative Law Judge John D. Clark dated November 16, 2010, is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2011.

---

JULIE A.N. SAMPLE  
BOARD MEMBER

c: Paul V. Dugan, Attorney for Claimant  
Robert G. Martin, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge

---

<sup>7</sup> *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

<sup>8</sup> K.S.A. 44-534a.